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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

DENNIS ROY CHOATE, 78-42

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
Table of Authorities	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
FEDERAL REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT OF CERTIORARI	13
ARGUMENT	18
I "MAIL COVER" SURVEILLANCE OF DOMESTIC FIRST-CLASS MAIL NECESSARILY INVADES THE ADDRESSEE'S REASONABLE EXPECTATION OF PRIVACY AND MUST THEREFORE ADHERE TO THE PROCEDURAL SAFEGUARDS AND GUARANTEES OF THE FOURTH AMENDMENT	18
A. The Decision Below Is in Conflict with the Recent "Pen Register" Decision of this Court, Proscribing Warrantless "Phone Cover" Surveillance	20

Page

B. The Instant "Mail Cover" Is Governed by No Applicable Exception to the Warrant Requirement and Is in Patent Non-Compliance with the Reasonableness Requirement 27

II "MAIL COVER" REQUESTS MAY BE COLLATERALLY ATTACKED FOR UNDERLYING UNTRUTHFULNESS AND SUCH INTENTIONAL FALSITY (AND NON-COMPLIANCE WITH APPLICABLE FEDERAL REGULATIONS) VITIATES THE REQUEST AND REQUIRES SUPPRESSION OF THE FRUITS OF THE SEARCH 31

III "MAIL COVER" SURVEILLANCE AND SEIZURE OF EVIDENTIARY MATERIAL FROM PRIVATE FIRST-CLASS CORRESPONDENCE, IF IMMUNE FROM FOURTH AMENDMENT SAFEGUARDS AGAINST ABUSE, UNREASONABLY TRENCHES UPON FUNDAMENTAL FIRST AMENDMENT RIGHTS 35

INDEX TO APPENDICES

(separately bound and filed)

APPENDIX A Opinion and Order of the United States Court of Appeals for the Ninth Circuit, filed March 15, 1978

APPENDIX B Order of the Ninth Circuit denying the Petition for Rehearing En Banc, filed June 6, 1978

APPENDIX C Opinion and Order of the United States District Court for the Central District of California, filed November 16, 1976, as officially reported in 422 F.Supp. 261

APPENDIX D Letter dated July 19, 1972 to Mr. Stanley H. Jenson Postal Inspector in Charge P.O. Box 30456 Los Angeles, California from MELVIN C. JOHNSON Special Agent in Charge

TABLE OF AUTHORITIES

Cases	Page
Baird v. State Bar 401 U.S. 1 (1971)	38
Bates v. City of Little Rock 361 U.S. 516 (1960)	37
Berger v. New York 388 U.S. 41 (1967)	19
Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1 (1964)	37, 38
Buckley v. Valeo 424 U.S. 1 (1976)	37
Coolidge v. New Hampshire 403 U.S. 467	27, 28
Gibson v. Florida Legislative Committee, 372 U.S. 539 (1963)	38
Griswold v. Connecticutt 381 U.S. 479 (1965)	37, 38
Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977)	25
Jackson, Ex parte 96 U.S. 727 (1877)	13
Katz v. United States 389 U.S. 347 (1976)	13, 16-19

	Page
Keyishian v. Board of Regents 385 U.S. 589 (1967)	38
Michigan Bell Telephone Company v. United States, ___F.2d___ (6th Cir., Oct. 7, 1977)	22
Milwaukee Publishing Co. v. Burleson 354 U.S. 407 (1920)	35
NAACP v. Alabama ex rel Patterson 357 U.S. 449 (1958)	37, 38
NAACP v. Button 371 U.S. 415 (1963)	37
Paton v. La Prade 524 F.2d 862 (3d Cir. 1965)	15
Roe v. Wade 410 U.S. 113 (1973)	38
Shelton v. Tucker 364 U.S. 479 (1960)	37, 38
Talley v. California 363 U.S. 60 (1960)	38
Terry v. Ohio 392 U.S. 1 (1968)	16, 30
United Mine Workers v. Illinois State Bar Assn. 389 U.S. 217 (1967)	37
United States v. Astroff 556 F.2d 1369 (5th Cir. 1977)	31

Page

United States v. Belculfine
508 F.2d 58 (1st Cir. 1974) 31

United States v. Caceras
545 F.2d 1182 (9th Cir. 1976)
cert. granted ___U.S.___
(46 U.S.L.W. 3749)
(June 5, 1978) 32

United States v. Carmichael
489 F.2d 983 (7th Cir. 1972) 31

United States v. Chadwick
___U.S.___ (45 U.S.L.W.
4797) (1977) 16

United States v. Choate
422 F.Supp. 261
(C.D. Cal. 1976) 11, 37

United States v. Choate
527 F.2d 748 (9th Cir. 1975) 7

United States v. Damitz
495 F.2d 50 (9th Cir. 1974) 31, 34

United States v. Giordano
415 U.S. 505 (1974) 24

United States v. Lee
540 F.2d 1205 (4th Cir. 1976) 31

United States v. Leonard
524 F.2d 1076 (2d Cir. 1975) 17

United States v. Luna
525 F.2d 4 (6th Cir. 1975) 31

Page

United States v. Marihart
492 F.2d 897 (8th Cir. 1974) 31

United States v. Miller
425 U.S. 435 (1975) 22

United States v. New York Telephone
Company, 434 U.S. 159
(Dec. 7, 1977) 16, 17, 20,
23, 25

United States v. Ramsey
___U.S.___ (45 U.S.L.W. 4577)
(1977) 17

United States v. Southwestern Bell
Telephone Co., 531 F.2d 809
(7th Cir. 1976) 22

United States v. United District
Court, 407 U.S. 297 (1972) 29

United States v. Van Leeuwen
397 U.S. 249 (1970) 17, 23

United States v. Watson
423 U.S. 411 (1976) 27

Statutes

18 U.S.C. § 3232 2

18 U.S.C. § 3731 2

26 U.S.C. § 7201 2, 6

28 U.S.C. § 1254(1) 2

Regulations	Page
39 C.F.R. § 233.2(c)(1)	4
39 C.F.R. § 232.2(c)(3)	4
39 C.F.R. § 233.2(e)(1)(ii)	5
39 C.F.R. § 233.2(g)(4)	9
40 Fed. Reg. 11579 (March 12, 1975)	4

Rules

Supreme Court Rules Rule 19(1)(b)	2
Fed. Rules Crim Pro. Rule 41	5, 16, 21
Rule 41(b)	21

Constitution

United States Constitution	
First Amendment	6, 36-39
Fourth Amendment	Passim
Ninth Amendment	11

Text

Circumventing Title III: The Use of Pen Register Surveillance in Law Enforcement, 1977 Duke L.J. 751 (1977)	24
The Legal Restraints upon the Use of the Pen Register As a Law Enforcement Tool, 60 Cornell L.Q. 1028 (1975)	24
Raggi, An Independent Right to Freedom of Association, 12 Harv. Civ. Rts. Civ. Liberties L. Rev. 1 (1977)	38

Miscellaneous

Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, (Surveillance), 94th Congress, 1st Sess. (1975) Part I, pages 232-34, 325 and 352-54	14
Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Invasions of Privacy (Government Agencies), 89th Cong., 1st Sess. (1965), at page 341	15
Omnibus Crime Control and Safe Streets Act of 1968 (Title III)	19

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OCURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-captioned case on March 15, 1978.

OPINIONS AND ORDERS BELOW

The opinion and order of the United States Court of Appeals for the Ninth Circuit has not been officially reported and is printed as Appendix A. The order of the Ninth Circuit denying the Petition

for Rehearing and the Suggestion for Rehearing En Banc, filed June 6, 1978, is printed as Appendix B. The opinion and order of the United States District Court is officially reported as United States v. Choate, 422 F.Supp. 261 (C.D. Cal. 1976) and is printed as Appendix C.

Appendices A, B and C are included in a separately presented submission, due to the voluminous nature of same.

JURISDICTION

The opinion and order of the Court of Appeals were filed March 15, 1978. A timely petition for rehearing and suggestion for rehearing en banc were filed by the petitioner and were denied on June 6, 1978. Jurisdiction of the District Court was based on 26 U.S.C. § 7201 and 18 U.S.C. § 3232. The government's appeal of the order suppressing evidence and granting the motion to dismiss was taken pursuant to 18 U.S.C. § 3731.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b).

QUESTIONS PRESENTED

1. Whether warrantless "mail cover" surveillance of domestic first-class mail, by the United States Postal Service at the behest of any requesting law enforcement agency, invades the addressee's reasonable expectation of privacy and implicates the important guarantees of the Fourth Amendment, in light of this Court's recent decision requiring less intrusive "phone cover" surveillance (by pen register device) to adhere to Fourth Amendment safeguards.

2. Whether a "mail cover" request may be collaterally attacked for untruthfulness, and whether the underlying and intentional falsity (and non-compliance with applicable federal regulations) vitiates the mail cover request, renders the resulting surveillance illegal and requires suppression of the evidence seized therefrom.

3. Whether warrantless "mail cover" surveillance and seizure of evidentiary material from private first-class correspondence unreasonably invades and chills fundamental First Amendment rights.

FEDERAL REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

1. No Act of Congress authorizes or regulates "mail covers." Under applicable postal regulations,[1/]

(a) "mail cover"

is defined as:

> "Mail cover is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third- or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (i) protecting the national security, (ii) locating a fugitive, or (iii) obtaining evidence of commission or attempted commission of a crime." 39 C.F.R. § 233.2(c)(1).

(b) "crime"

is defined as:

> ". . . any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding 1 year." 39 C.F.R. § 233.2(c)(3).

1/ The mail cover regulations were republished without substantive change in March, 1975. 40 Fed.Reg. 11579 (March 12, 1975).

(c) Postal officials and their designees are empowered to "order mail covers within their district":

> "Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime." 39 C.F.R. § 233.2(e)(1)(ii).

(d) "Law enforcement agency"

includes any federal, state or local governmental agency

> ". . . one of whose functions is to investigate the commission or attempted commission of acts constituting a crime." 39 C.F.R. § 233.2(c)(4).

2. The Fourth Amendment of the United States Constitution as implemented by Rule 41, Federal Rules of Criminal Procedure, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The First Amendment of the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

On August 21, 1974, petitioner (hereinafter "Choate") was indicted for income tax evasion for understating his income in 1970 and 1971, in violation of 26 U.S.C. § 7201. Having voluntarily filed amended returns for those years in October, 1972, and having paid all taxes due prior to the institution of the instant prosecution, Choate initially moved to dismiss the indictment on November 1, 1974 for "discriminatory enforcement," predicated upon the usual IRS policy not to prosecute such taxpayers.

The District Court instead dismissed the indictment because testimony at the initial hearing in 1974 revealed that the government had attempted to elicit incriminating information about Choate from his attorney through the agency of an undercover informant, who was about to be indicted and was soon thereafter convicted and imprisoned for his own narcotics dealings. The Ninth Circuit reversed, finding no denial of the effective assistance of counsel or other prejudice to Choate, since the attorney was advised of the informant's covert purpose. United States v. Choate, 527 F.2d 748, 751-52 (9th Cir. 1975).

Upon remand, Choate on July 13, 1976 moved to suppress all physical evidence on the theory that it was entirely the tainted fruit of a series of illegal entries and searches of his home conducted by another undercover government informant (Thompson) in April, 1971. At the evidentiary hearing on the motion, it was revealed that: (1) following these illegal entries, Thompson first brought Choate to the attention of

California State Bureau of Narcotics Enforcement (BNE) law enforcement authorities in mid-1971 and was promised leniency if he could "make a case" against Choate; (2) in March, 1972, Special Agent Williams, upon joining the federal Bureau of Customs, was provided the same 1971 BNE Report to review and in turn contacted Thompson who reported no new information on Choate; (3) possessed with no other leads, Agent Williams began an investigation of Choate's assets and in April, 1972 unsuccessfully attempted to interest IRS Agent Sherrard in a tax evasion investigation, whom he approached because he was admittedly "not having much luck in getting a seizure or coming up with a substantive case against Mr. Choate."

At the same evidentiary hearing, in attempting to dissipate any taint of essential physical evidence attributable to Thompson's illegal entries of Choate's home, Agent Williams revealed for the first time (despite earlier and ample

discovery demands[2/]) that on July 19, 1972 he instituted a "mail cover" of all Choate's correspondence. This "mail cover" was initiated by a written request[3/] which was silent about tax evasion and asset-tracing, which in fact was based solely on stale and uncorroborated information in the 1971 BNE report and which simply averred:

> "CHOATE is currently organizing a large narcotic smuggling ring with the primary source located in South America. It is felt that CHOATE and the source in South America correspond by mail. Return addresses on mail received at the above addresses would be of aid in identifying the source in South America and other members of the smuggling ring."

2/ A motion for pre-trial discovery was made on November 4, 1974, but the existence of the mail cover was first revealed at the July 13, 1976 hearing, despite the requirements of 39 C.F.R. § 233.2(g)(4). ("Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.")

3/ The entire "mail cover" request of July 19, 1972 is reproduced as Appendix D.

As a result of this "mail cover" request, every piece of mail addressed to Choate at three addresses (residence, business and post office box) was segregated and examined by the Postal Service for a one month period (July 25 to August 25, 1972), and every return address was recorded in a permanent log which was in turn transmitted to Agent Williams.

In fact, this "mail cover" produced no South American or international mail, but did reveal the identity of Choate's personal bank accounts and major credit card issuers, from which Agent Williams immediately obtained vast information concerning Choate's expenditures, all of which was turned over to the IRS. In September, 1972, the IRS opened an official investigation leading to Choate's amended tax returns and payment in October, 1972, his indictment in 1974 and all subsequent proceedings.

Following the 1976 suppression hearing, the District Court held that the Government had sustained its burden of attenuating the taint of Thompson's

illegal entries and searches, but that the mail cover was governed by and conducted in violation of the Fourth Amendment and that the evidence must be suppressed. United States v. Choate, 422 F.Supp. 261, 263 (C.D. Cal. 1976). The District Court thereupon dismissed the indictment, having found, as the Government conceded on its subsequent appeal, that "all evidence sought to be introduced against the defendant in this case was derived from exploitation of leads derived from the . . . mail cover." (Id., at 271.)

On appeal, the United States Court of Appeals for the Ninth Circuit reversed (Judge Hufstedler dissenting), holding that "mail cover" surveillance and seizure of such evidentiary leads pursuant to such a criminal investigation is not a "search" within the ambit of Fourth Amendment procedural safeguards and guarantees, and that the addressee's First Amendment associational rights and Ninth Amendment privacy rights were likewise not violated.

Judge Hufstedler dissented at length, being of the opinion that:

1. There was intentional non-compliance with applicable postal regulations, in that all material representations in the mail cover request were intentionally falsified by Agent Williams, and that evidence obtained from the surveillance of Choate's mail and its fruits must therefore be suppressed;

2. The instant mail cover trenches upon personal interests protected by the Fourth Amendment, constitutes a search and seizure of intangible evidentiary matter under the "reasonable expectation of privacy" rubric of Katz and its progeny, and therefore implicates and violates the procedural requirements of both the warrant clause and the reasonableness clause of the Fourth Amendment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The reasons for granting the writ as amplified in the following argument, are:

1. The constitutionality of the widespread use by law enforcement officers of warrantless "mail cover" surveillance of domestic first-class mail is an important question of federal law which has never been, but should be, decided by this Court. Although neither authorized nor regulated by any Act of Congress, this governmental mail watch has continued unabated since originally authorized by postal regulation nearly a century ago,[4/] unfettered by antecedent

4/ Postal Regulations first addressed and authorized the use of "mail covers" in 1893, some twenty-six years after the decision in Ex parte Jackson, 96 U.S. 727 (1877) wherein this Court specifically extended Fourth Amendment protection to warrantless governmental inspection of first-class mail. Notably, Ex parte Jackson was one of only four decisions cited by this Court in support of its now famous pronouncement that ". . . the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

judicial approval, probable cause requirements or other legal safeguards against abuse.

2. This unresolved question of federal law has enormous importance, far beyond the confines of this case or the contentions of these parties, in that such "mail cover" requests are an exceedingly common[5/] (though little known) investigative tool, granted virtually

---

5/ In 1973-74, some 9,130 Postal Service "mail covers" were in effect a total of 339,425 surveillance days, causing the segregation and search through named addressees' mail, the recordation of postmarks, postage meter numbers and return addresses, and the transmission of all such data to the requesting law enforcement agent. There were 4,528 other "mail covers" in effect during 1972 when Choate's was requested and instituted (though not discovered until 1976). See, Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, (Surveillance), 94th Congress, 1st Sess. (1975), Part I, pages 232-35, 326 and 352-54.

automatically,[6/] and yet are never discovered by the named addressees (or senders) of private correspondence, unless a criminal prosecution ensues and the device is uncovered through discovery. Moreover, and as emphasized by Judge Hufstedler in dissent, "in view of the fact that mail covers often lead to investigation of senders of mail as well as addressees, it can readily be seen that the rights of large numbers of citizens are involved." (Slip Opinion, Dissent, page 9) See, e.g., Paton v La Prade, 524 F.2d 862 (3rd Cir. 1965) (FBI investigated everyone who wrote to the Socialist Workers Party, identified by continuous "mail cover" surveillance of this addressee, causing enormous inconvenience, embarrassment and adverse local and national publicity to sixteen-year old Lori Paton who misdirected a

---

6/ Of the approximately 48,000 mail covers requested in the years 1961-64, all but 70 were approved. See, Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Invasions of Privacy (Government Agencies), 89th Cong., 1st Sess. (1965), at page 341.

letter to the addressee as part of a high school assignment to study the current political spectrum).

3. The decision of this important federal question by the Ninth Circuit is in conflict with the very recent and precisely analogous decision of this Court, to wit, United States v. New York Telephone Co., 434 U.S. 159 (December 7, 1977) (holding that "phone covers" implemented through telephonic "pen register" surveillance do involve a search and seizure and thereby implicate the important guarantees of the Fourth Amendment and of Federal Rule of Criminal Procedure 41). As importantly, the decision of the Ninth Circuit is in conflict with the fundamental principle underlying this Court's important series of Fourth Amendment decisions since abandoning the restrictive property concepts and preoccupation with physical intrusion and trespass in Katz v. United States, 389 U.S. 347 (1967). See, e.g., cases from Terry v. Ohio, 392 U.S. 1 (1968) to United States v. Chadwick, ___U.S.___ (45 U.S.L.W. 4797) (1977), and

culminating by way of most relevant example in the "phone cover" decision in United States v. New York Telephone Co., supra, handed down seven months after oral argument in the instant action.

4. Most importantly, since Katz was decided over a decade ago, the only Court of Appeals to consider the applicability of Fourth Amendment safeguards to "mail covers" has been the Second Circuit in United States v. Leonard, 524 F.2d 1076 (2nd Cir. 1975). However, Leonard only involved a "mail cover" of incoming international mail, so that its analysis and conclusion should not govern the Fourth Amendment's applicability to "mail covers" of domestic mail, in light of the "border search" exception to the Warrant Clause.[7/] Thus, Judges Cummings and Wallace readily admit in their majority opinion below:

> ". . . it does appear that the instant case is the first

7/ Compare, United States v. Ramsey, ___U.S.___ (45 U.S.L.W. 4577, 4579-82) (1977) with United States v. Van Leeuwen, 397 U.S. 249, 251-53 (1970).

post-Katz situation where the constitutionality of the mail cover device has been squarely presented in a manner requiring extensive analysis." (Slip Opinion, page 15)

ARGUMENT

I

"MAIL COVER" SURVEILLANCE OF DOMESTIC FIRST-CLASS MAIL NECESSARILY INVADES THE ADDRESSEE'S REASONABLE EXPECTATION OF PRIVACY AND MUST THEREFORE ADHERE TO THE PROCEDURAL SAFEGUARDS AND GUARANTEES OF THE FOURTH AMENDMENT.

Unquestionably, one's personal, professional or political correspondents, their locations, and the frequency and dates of one's communications with them are information private to the individual in a free society. With the one glaring exception at issue herein, such information can only be obtained by searching a person's personal papers or his mailbox, pursuant to a duly issued and executed search warrant based upon probable cause.

The instant petition presents for the first time an opportunity for this Court

to harmonize Fourth Amendment standards applicable to the burgeoning variety and frequency of governmental surveillance,[8/] by including aberrational and often indiscriminate "mail cover" surveillance within the ambit of Fourth Amendment protection.

As Judge Hufstedler eloquently stated in dissent:

> "The information obtained through mail cover surveillance provides a data bank which is a potent investigative tool.
>
> "It is possible to learn the identities, addresses and frequency of contact of most of a person's correspondents through a one-month mail cover--including banks, creditors, affiliations with religious, political, educational, and voluntary organizations, publications received, accountants, and friends. [Footnote omitted.] Because many of these correspondents maintain files on the addressee

8/ The long and controversial history of administratively approved wiretapping and electronic surveillance in this country came to an abrupt end over a decade ago. See, Katz v. United States, supra; Berger v. New York, 388 U.S. 41 (1967); and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

which can be discovered and used by the investigating agency (e.g., bank accounts, United States v. Miller (1976) 425 U.S. 435), the mail cover used in combination with other techniques quickly makes the subject's life an open book to investigators.

* * *

"As was previously noted, the compilation of data obtained through a mail cover exposes the personal life of the subject before law enforcement agencies in a manner unobtainable even through surveillance of his movements. (Emphasis added.) (Slip Opinion, at pages 6-7 and 28 of the Dissent, reproduced in Appendix A.)

A. The Decision Below Is in Conflict with the Recent "Pen Register" Decision of this Court, Proscribing Warrantless "Phone Cover" Surveillance.

On December 7, 1977, the Surpeme Court, in United States v. New York Telephone Co., supra, held that the utilization of a pen register constitutes a search and seizure which the District Court was properly empowered to authorize, predicated upon a proper finding of probable cause and otherwise in

conformity with Federal Rule of Criminal Procedure 41. As the Supreme Court noted:

> "A pen register is a mechanical device that records the numbers dialed on a telephone by monitorying the electrical impulses caused when the dial in the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." (46 U.S.L.W. at 4034, n. 1.)

Most importantly, the Supreme Court noted that the scope of Federal Rule of Criminal Procedure 41(b), governing the issuance of search warrants:

> ". . . is broad enough to encompass a 'search' designed to ascertain the use which is being made of a telephone suspected of being employed as a means of facilitating a criminal venture and the 'seizure' of evidence which the 'search' of the telephone produces." (Id. at 4036.)

Finally, the Supreme Court noted that each Court of Appeals which had considered the matter "agreed that pen register orders are authorized by Federal Rule of Criminal Procedure 41 or by an inherent power closely akin to it to

issue search warrants under circumstances conforming to the Fourth Amendment," citing Michigan Bell Telephone Company v. United States, ___F.2d___ (6th Cir. Oct. 7, 1977), United States v. Southwestern Bell Telephone Co., 531 F.2d 809 (7th Cir. 1976). (Id. at 4036, n. 14.)

Remarkably, the majority opinion of Judges Cummings and Wallace below contains no discussion of or attempt to distinguish any of the "pen register" surveillance cases cited above, although they introduce their Fourth Amendment analysis of mail cover surveillance by stating:

> "While the Supreme Court has not expressly passed on the mail cover device, recent analogous opinions lead us to conclude that it would not hold mail covers unconstitutional. . .." (Emphasis added.) (Majority Opinion, p. 15.)

The principal decisions relied upon as analogous are United States v. Miller, 425 U.S. 435 (1975) (which is readily distinguishable in that (a) it is common knowledge that banking transactions are recorded, whereas the mail cover technique

is far from universally known, and (b) a depositor can control or avoid banking transactions, whereas a recipient of mail cannot control or avoid others' use of the mail) and United States v. Van Leeuwen, 397 U.S. 249 (1970) (which is inapposite in that only two packages were involved, each outwardly suspicious, justifiably leading the postal authorities to summon the police who in turn obtained a search warrant to further explore the suspicious circumstances). The more recent and far more analogous pen register surveillance cases would appear to be constitutionally indistinguishable, yet are ignored by the majority.

In contrast, Judge Hufstedler in dissent relies heavily upon the pen register decision in United States v. New York Telephone Co., supra, in concluding that the far more intrusive "mail cover" surveillance at issue herein necessarily constitutes a search and seizure and therefore invokes both the warrant clause and the reasonableness clause of the Fourth

Amendment.[9] Judge Hufstedler accurately notes that a mail cover "reveals that a piece of mail was actually sent, usually the identity as well as the address of the correspondent, and other information including the contents thereof in" second, third and fourth-class mail, whereas a pen register "merely records that a call was made to a specific number."[10]

9/ This conclusion is further bolstered by Mr. Justice Powell's observation in United States v. Giordano, 415 U.S. 505, 533-54 (1974) (concurring opinion) that:

> "Because a pen register device is not subject to the provisions of Title III [of the Omnibus Crime Control and Safe Streets Act of 1968], the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment."

10/ Dissenting Opinion (Slip Opin.), n. 26 (fn. 68). Several commentators have found pen register orders to be constitutionally indistinguishable from mail covers. See, e.g., Note, The Legal Restraints upon the Use of the Pen Register As a Law Enforcement Tool, 60 Cornell L.Q. 1028 (1975); Note, Circumventing Title III: The use of Pen Register Surveillance in Law Enforcement, 1977 Duke L.J. 751 (1977).

Finally, and even more remarkable than its failure to discuss or distinguish United States v. New York Telephone Company, supra, is the majority's citation of Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977) for the proposition that the decisions involving telephonic pen registers support the conclusion that a mail cover involves no search because the contents of letters are not disclosed. (Slip Opinion, p. 16, n. 10.) Hodge is inapposite since the Ninth Circuit merely concluded that where a telephone company installs such a device on its own to investigate abuse of its service, the Fourth Amendment is not implicated. As Judge Hufstedler stated, concurring in Hodge, "We leave for another day a Fourth Amendment challenge to the telephone company's installation of a pen register at the request of the Government to investigate a crime that is unrelated to the delivery of telephone service." (Id. at 267.)

In short, when a person sends a letter through the mail, both the sender and the recipient reasonably expect that the fact

of their communication, as well as its content, will remain private. In a world where the distances between people are great and where time requires more expediency than hand-delivered communications afford, the mail service, even more than the telephone, is relied upon as an impartial (and inexpensive) message carrier. Neither the addressee nor the sender expects that the mail will be opened and read. Nor does either expect, and reasonably so, that their names and addresses, once observed (often mechanically for mail delivery purposes), will be recorded and stored and thereafter transmitted to and used by government agents outside the Postal Service for non-postal purposes. Undeniably, the addressee certainly does not expect that every envelope that arrives from a correspondent will already have been studied for clues as to the recipient's private affairs.

A "mail cover," like a "phone cover," therefore intrudes upon a channel of communication seizing the identity and origin of the sender of the communique.

Thus, it too constitutes a search and seizure and is governed by both the Warrant and Reasonableness Clauses of the Fourth Amendment.

B. The Instant "Mail Cover" Is Governed by No Applicable Exception to the Warrant Requirement and Is in Patent Non-Compliance with the Reasonableness Requirement.

In the circumstances herein, none of the "jealously and carefully drawn exceptional circumstances," United States v. Watson, 423 U.S. 411, 427 (1976)(Powell, J., concurring) justify dispensing with the warrant requirement of the Fourth Amendment. The Government cannot assert that there was any exigency or need for instantaneous results which make obtaining a warrant unworkable, e.g., Coolidge v. New Hampshire, 403 U.S. 464, 470, since the "mail cover" procedure itself contemplates a Postal Service review which would not require less time than review by a magistrate. Herein, the "mail cover" was requested July 19 and

instituted July 25, a six-day delay. Moreover, it is clear that a cover of any thirty-day period would have sufficed and well-satisfied Agent Williams' true purposes: asset-tracing. Finally, there was no consensual basis for dispensing with a warrant and the "plain view" doctrine, while superficially appealing, is plainly inapplicable[11/] and begs the principal question in issue herein concerning the privacy expectations of citizens using the government's mail service.

The need for imposing Fourth Amendment safeguards is self-evident. A neutral magistrate, and not an executive officer in a coordinate law enforcement branch of an executive agency, must perform the task of differentiating intrusive

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11/ The mail involved is itself unsuspicious and unremarkable, and there is no cause, cognizable by the Fourth Amendment, for its detention and detailed examination. Moreover, the evidence seized is not of a character by which "it is immediately apparent to the police that they have evidence before them." See, Coolidge v. New Hampshire, supra, 403 U.S. at 464-473.

fishing expeditions from legitimate searches for evidence or instrumentalities of crime, based upon probable cause. As this Court noted in United States v. United States District Court, 407 U.S. 297, 316-318 (1972) (holding warrants to be required for national security wiretaps):

> "Those Fourth Amendment freedoms cannot properly be guaranteed if . . . surveillance may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute . . . .. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks . . . .. The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will be best preserved through a separation of powers and division of functions among the different branches of Government . . .. The independent

check upon executive discretion is not satisfied . . . by . . . post-surveillance review." (Emphasis added.)

Finally, the scope of the search herein unreasonably exceeded the purpose which was advanced to justify it. The sole justification for the mail cover was the need to identify a South American addressee, yet all mail (including mail from domestic sources such as banks and creditors) was surveilled, segregated and searched. As this Court has repeatedly emphasized, whether a search is pursuant to warrant or to a recognized exception to the warrant requirement, it must nonetheless comply with the Reasonableness Clause of the Fourth Amendment, In short, "the scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry v. Ohio, supra, 392 U.S. at 19.

II

"MAIL COVER" REQUESTS MAY BE COLLATERALLY ATTACKED FOR UNDERLYING UNTRUTHFULNESS AND SUCH INTENTIONAL FALSITY (AND NON-COMPLIANCE WITH APPLICABLE FEDERAL REGULATIONS) VITIATES THE REQUEST AND REQUIRES SUPPRESSION OF THE FRUITS OF THE SEARCH

In all circuits which have reached the issue, intentional misstatement of material facts in an affidavit by a government agent serves to vitiate a search warrant. United States v. Belculfine, 508 F.2d 58, 60-64 (1st Cir. 1974); United States v. Lee, 540 F.2d 1205, 1208-9 (4th Cir. 1976); United States v. Astroff, 556 F.2d 1369, 1371-74 (5th Cir. 1977); United States v. Luna, 525 F.2d 4, 6-9 (6th Cir. 1975); United States v. Carmichael, 439 F.2d 983, 988-89 (7th Cir. 1972); United States v. Marihart, 492 F.2d 897, 899-902 (8th Cir. 1974); United States v. Damitz, 495 F.2d 50, 53-54 (9th Cir. 1974). To date, this Court has not resolved differences among the circuits on the question of whether negligent and material or intentional but

non-material misstatements may vitiate the warrant. See, United States v. Caceres, 545 F.2d 1182, 1187-88 (9th Cir. 1976), cert. granted, ___U.S.___ (46 U.S.L.W. 3749) (June 5, 1978).

Facts established at the July, 1976 evidentiary hearing demonstrate that all the material representations in the "mail cover" request[12/] were intentionally falsified by Agent Williams. More specifically, of the three material representations to the Postal Service constituting "reasonable grounds" for the requested cover, each was totally untrue. First, Williams had no "current" information upon which to assert that Choate was "currently organizing" a narcotic smuggling ring. When Agent Williams so represented on July 19, 1972, his only information was Thompson's April, 1971 uncorroborated assertion to state BNE agents which had been passed along to the Bureau of Customs, and all of Williams' efforts to obtain additional information had failed. Second, Thompson's report to BNE and to Agent Williams indicated only that Choate

12/ Reproduced in full as Appendix D.

had travelled to South America, so the averment in the request that Choate and the purported South American contacts corresponded by mail was pure speculation. Third, the essential predicate for the mail cover was the statement in the request that it would aid in identifying the South American source, a material falsehood since Williams' own testimony confirmed that prior to instituting the mail cover, he had turned his attention fully to "asset tracing," had given up attempting to make a substantive case against Choate and had already contacted IRS Agent Sherrard.

Such a brazen abuse of the "mail cover" procedure to fish for information outside Agent Williams' jurisdiction demands application of the well-settled rules permitting collateral attack on the averments advanced to justify a search warrant.

Inexplicably, the majority opinion below refuses to consider the collateral attack on the mail cover request for untruthfulness, stating that "defendant on appeal and the district judge did not

question Williams' veracity." In fact, as Judge Hufstedler recognized (Slip Opinion, Dissent, pp. 10-18), and as the District Court emphasized (ibid., 422 F. Supp. at 271), evidentiary hearings in the district court specifically probed Agent Williams' veracity and revealed that his sole purpose was "asset tracing" when he instituted the surveillance of Choate's domestic first-class mail.

Clearly, Postal Service approval cannot be a conclusive determination of the validity of a mail cover request. Collateral attacks on the veracity of search warrant affidavits are essential to further "a basic purpose of the [Fourth] Amendment and the exclusionary rule, namely the deterrence of lawless police action." United States v. Damitz, 495 F.2d 50, 55-56 (9th Cir. 1974). In the context of a Postal Service "mail cover" procedure, the need for post-surveillance judicial review is even more pronounced, since the representations of coordinate law enforcement agencies are accepted virtually without question or review and the searches instituted virtually automatically.

Thus, Fourth Amendment rights and reasonable expectations of privacy aside, even the purpose sought to be effectuated by the "mail cover" regulations is eviscerated when such undeniably false and conclusionary statements are sufficient to institute a mail cover leading directly to criminal indictment and prosecution, if the underlying request is then immunized from judicial scrutiny and sanction.

III

"MAIL COVER" SURVEILLANCE AND SEIZURE OF EVIDENTIARY MATERIAL FROM PRIVATE FIRST-CLASS CORRESPONDENCE, IF IMMUNE FROM FOURTH AMENDMENT SAFEGUARDS AGAINST ABUSE, UNREASONABLY TRENCHES UPON FUNDAMENTAL FIRST AMENDMENT RIGHTS

As Justice Holmes long ago observed: "The use of the mail is almost as much a part of free speech as the right to use our tongues." Milwaukee Publishing Co. v. Burleson, 354 U.S. 407, 437 (1920) (dissenting opinion). The mails in this country are used as a method of communication, no less sacred than face-to-face

conversation. They continue to be the principal conveyance of private ideas and thoughts from one part of the country to another. Any type of governmental intrusion into such personal affairs, even as to those suspected of wrongdoing, is bound in time to curtail the free exchange of ideas which is the bulwark of the First Amendment, unless carefully circumscribed to prevent indiscriminate and unregulated government snooping by requiring adherence to Fourth Amendment standards.

The District Court below stated this basic principle with remarkable clarity:

> "While one desiring to protect his privacy may be put to a choice as to whether or not to install a telephone, there are few alternatives to the mail. Surely, in a free society, citizens should be left at least one unfettered means of communication which cannot be invaded without the showing of probable cause necessary for a search warrant. To allow the government to give an absolute monopoly and then to use it to invade the privacy of the citizenry without the protection of judicial scrutiny is to license the blatant circumvention of Constitutional

> rights." (United States v. Choate, supra, 422 F.Supp. at __.) (Emphasis added.)

Similarly, in the Court of Appeals below, Judge Hufstedler recognized the potential chill on First Amendment rights of expression, inquiry and association which would flow from the unregulated use and abuse of "mail cover" surveillance:

> "Because the data will 'reveal much about his relationships with both individuals and organizations' his First Amendment 'freedom of association is also implicated.' (Nixon v. Administration of General Services, __ U.S. __ at __ [45 U.S.L.W. at 4946] (Berger, C.J., dissenting), citing NAACP v. Alabama, 357 U.S. 449, 462 (1958)). (Slip Opinion, Dissent, pages 28-29).

Undeniably, First Amendment rights of association,[13/] and the rights of

13/ See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217; Griswold v. Connecticut, 381 U.S. 479 (1965); Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

(continued)

privacy generated therefrom,[14] are compromised by warrantless "mail cover" surveillance. All of an individual's correspondents, both personal and political, economic and religious, are identified, recorded and disseminated to the requesting law enforcement agency.

Vital First Amendment rights of organizations and associations to preserve the privacy of their membership[15] and of individuals to preserve the privacy of their associational ties[16] are seriously

13/ (continued) See also, Raggi, An Independent Right to Freedom of Association, 12 Harv. Civ. Rts.-Civ. Liberties L. Rev. 1 (1977).

14/ Griswold v. Connecticut, 381 U.S. 479 (1964); Roe v. Wade, 410 U.S.113 (1973).

15/ NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Baird v. State Bar, 401 U.S. 1 (1971); Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964).

16/ Gibson v. Florida Legislative Committee, 372 U.S. 539 (1963); Talley v. California, 363 U.S. 60 (1960).

jeopardized by a widespread governmental mail watch not limited to Fourth Amendment purposes and protections. If such membership lists or associational ties can be secretly discovered by any governmental agency, without probable cause and by simply requesting a "mail cover," and under the current scheme of regulation they can, these vital associational rights lose that mantle of protection so carefully constructed by this Court in order to preserve First Amendment guarantees.

In short, current "mail cover" regulations and practice, as demonstrated in this case, are clearly violative of the fundamental right of privacy of association. Only if subjected to Fourth Amendment standards will there be the compelling state interest in each instance to justify the resultant invasion.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the Writ of Certiorari petitioned for herein.

Executed this 29th day of June, 1978 at Los Angeles, California.

Respectfully submitted,

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